

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

RIZZO ENVIRONMENTAL
SERVICES, INC.,

Plaintiff,

vs.

Case No. 2014-2707-CB

ADVANCED DISPOSAL SERVICES
SOLID WASTE MIDWEST, LLC,

Defendant.

OPINION AND ORDER

Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied.

Factual and Procedural History

Plaintiff is a provider of waste removal services throughout Southeast Michigan for commercial and municipal entities. Plaintiff employs numerous drivers and loaders. Each of Plaintiff's drivers and loaders executed employment contracts with Plaintiff, which included a non-compete provision (the "Non-Compete").

On July 10, 2014, Plaintiff filed its complaint in this matter against Defendant, an entity which offers services that compete with those provided by Plaintiff. Plaintiff's claims revolve around its allegation that Defendant's agent(s) directly contacted Plaintiff's drivers and/or loaders ("Targeted Employees") and solicited them to leave their employment with Plaintiff and come to Defendant to do similar work. Plaintiff's complaint purports to state a claim for tortious interference with a contract (Count I), a

claim for tortious interference with a business expectancy (Count II), as well as two counts for injunctive relief (Counts III and IV).

On July 31, 2014, Defendant filed its counterclaim seeking declaratory relief. Specifically, Defendant seeks an order holding that the Non-Compete is unenforceable.

On December 5, 2014, Defendant filed its instant motion for summary disposition. On January 5, 2014, Plaintiff filed its response requesting that the motion be denied, and that the Court enter an order holding that the Non-Compete is valid and enforceable. On January 13, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

In its motion, Defendant first contends that Plaintiff's tortious interference claims fail as a matter of law. Tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts under Michigan

law. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843 (2005). The Court in *Health Call* summarized the elements needed to establish the torts as follows:

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Id., at 89-90 [internal citations omitted]

In its motion, Defendant first contends that Plaintiff's tortious interference with a contract claim fails as a matter of law because its alleged interference did not result in Plaintiff's employees breaching the terms of the Non-Compete. While Plaintiff concedes that Defendant's interference did not result in any of the Targeted Employees leaving their employment, Plaintiff contends that it may nevertheless maintain its claim because Plaintiff had to raise the Targeted Employees' wages in order to prevent them from leaving. However, in order to maintain a claim for tortious interference with a contract the interference must result in a breach of the contract. *Health Call of Detroit*, Mich App at 89. In this matter, no breach(es) took place and Plaintiff has failed to provide the Court with any authority in support of its assertion that a breach is not needed to state an actionable claim for tortious interference. Consequently, the Court is convinced that Defendant's motion for summary disposition of Plaintiff's tortious interference with a contract claim must be granted.

Likewise, in order to state a claim for tortious interference with expectancy, the alleged interference must result in a breach of the expectancy. *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). In this case, Plaintiff has failed to allege that any expectancy was breached/terminated. Consequently, Plaintiff's tortious interference with a business expectancy claim fails as a matter of law.

The final portion of Defendant's motion seeks a declaratory judgment providing that the Non-Compete is unenforceable. "As a general matter, courts presume the legality, validity, and enforceability of contracts." *Coates v Bastian Bros, Inc.*, 276 Mich.App 498, 507; 741 NW2d 539 (2007). However, "noncompetition agreements are disfavored as restraints on commerce and are only enforceable to the extent they are reasonable." *Id.* See also *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). Thus, a restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable. Additionally, a restrictive covenant must be reasonable as between the parties, and it must not be especially injurious to the public. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).

In order to be reasonable, "a restrictive covenant must protect against the employee gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." *Coates*, 276 Mich App at 507 (quotation omitted). In addition, "[b]ecause the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition." *St Clair Med, PC*, 270 Mich App at 266.

“The burden of demonstrating the validity of the agreement is on the party seeking enforcement.” *Coates*, 276 Mich App at 508.

In this case, the Non-Compete provides:

Employee is an at-will employee of [Plaintiff] and either the Employee or [Plaintiff] may terminate the Employee’s employment at any time, with or without cause, with or without notice, and for any reason. Nothing contained in this Agreement shall change the nature of Employee’s at-will Employment.

Non-Competition/Non-Solicitation. Employee agrees that during his/her employment with [Plaintiff], and for a period of 18 months following Employee’s employment separation from [Plaintiff], regardless of whether Employee quits or was terminated, Employee will not directly own, manage, operate, control or otherwise engage or participate in, whether as a proprietor, stockholder, director, officer, consultant, independent contractor, employee or in any capacity in any business that provides similar services as [Plaintiff] within a 100 mile radius of [Plaintiff’s] headquarters [in Sterling Heights]

In its response to Defendant’s motion, Plaintiff asserts that the Non-Compete is needed to protect a reasonable competitive interest. Specifically, Plaintiff avers that the Targeted Employees had knowledge of its confidential information. In particular, Charles B. Rizzo, Plaintiff’s CEO, testified that the Targeted Employees have knowledge of Plaintiff’s bid strategies, its forms, procedures and business plans regarding potential clients and outstanding bids, as well as know Plaintiff’s clients’ preferences and contracts.

Preventing the anti-competitive use of confidential information is a legitimate business interest. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007). Accordingly, if Plaintiff were able to establish that an employee had access its confidential information then Plaintiff may be able to utilize a non-competition provision, within reason, to protect its interests. However, the problem

with the parties' request for declaratory relief is that the reasonableness of a non-competition provision must be determined on a case-by-case basis. Indeed, while one or more of the Targeted Employees may possess information that is worthy of protecting, it is entirely possible that others may not possess such information. In this matter, the parties both seek a blanket decision deciding whether the Non-Compete is valid and enforceable with respect to all of Plaintiff's drivers and handlers; however, for the reasons discussed above, the reasonableness of the Non-Compete could differ from employee to employee. Consequently, the parties' request for declaratory relief must be denied, and Defendant's claim for declaratory relief must be dismissed.

Conclusion

For the reasons discussed above, Defendant's motion for summary disposition of Plaintiff's claims is GRANTED. Further, Defendant's claim for declaratory relief is DISMISSED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and CLOSES the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: January 29, 2015

JCF/sr

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